No. 84-351

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ATASCADERO STATE HOSPITAL, *et al.*,

Petitioners,

v.

DOUGLAS JAMES SCANLON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENT ON BEHALF OF SENATOR ALAN CRANSTON, SENATOR CLAIBORNE PELL, SENATOR ROBERT STAFFORD, SENATOR LOWELL WEICKER, REPRESENTATIVE MARIO BIAGGI, REPRESENTATIVE DON EDWARDS, REPRESENTATIVE WILLIAM FORD, REPRESENTATIVE JAMES JEFFORDS, and REPRESENTATIVE GEORGE MILLER

BONNIE MILSTEIN
Center for Law and
Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

Counsel for Amici

EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Should Quern v. Jordan, 440 U.S. 332 (1979), be applied retroactively to statutes adopted prior to March 5, 1979?

2. Is Quern v. Jordan, insofar as it holds that no statute can abrogate a state's sovereign immunity unless the statutory history or language "focuses directly on the question of state liability", inconsistent with Article I of the Constitution?

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STATEMENT OF INTEREST*

This amicus brief is submitted on behalf of nine members of Congress. Most of the amici were members of Congress when section 504 was originally enacted. Senators Cranston and Stafford are the only present members of the Senate who served in 1972 on the Subcommittee on the Handicapped of the Labor and Public Welfare Committee, which actually drafted section 504 in that year.

Amici believe that the construction of section 504 urged by petitioner in this case would as a practical matter largely

* Letters from the parties as consenting to the filing of this brief are being filed with the Clerk.

nullify that statute insofar as it applies to the states. Petitioner argues that section 504 should be read to allow the federal courts to grant only prospective relief for violations of that law. Such a construction would effectively postpone the effective date of the law, which Congress provided would be September 26, 1973, until whatever time in the future a federal judge issues an injunction directing a particular state institution to obey the law. Absent such an injunction, and immune from any threat of financial consequences for disobedience, the states would be free to discriminate on the basis of handicap in any or all of their federally assisted programs. We would hope that, were section 504 a eviscerated in this manner, California and the other states receiving federal

assistance would choose to refrain from such discrimination. But in enacting section 504 it was the intent of Congress to create a law to compel all federal aid recipients to desist at once from any form of discrimination against the disabled, not to merely make a casual suggestion which the states, absent a federal injunction, were at liberty to accept or disregard at will.

Petitioner's suggestion that Quern v. Jordan, 440 U.S. 332 (1979), be applied retroactively to statutes enacted prior to 1979 would present Congress with a problem unique in both its magnitude and complexity. Quern, as petitioner interprets it, requires that Congress legislate in a special way when it wishes to subject the states to suit for violating a federal law. Whatever the merits of this stan-

dard, it was not the reigning constitutional theory in 1972-73 when section 504 was enacted, nor was it the clearly established rule of construction when most existing federal laws were adopted. If Quern is applied retroactively, Congress will be compelled to review large portions of the United States Code, much of it enacted even earlier than section 504, to restore the meaning of statutes that would otherwise be altered by the application of such a rule.

Amici believe that the decision in Quern, unless limited by this Court, would raise serious constitutional problems under Article I. The doctrine that petitioner proposes to read into Quern does not purport to be a method of divining the intent of the Congress, but seeks to require Congress to legislate in

a special manner whatever it subjects the states to suit in federal court. This doctrine is claimed to stem not from any demonstrated congressional concern about such immunity, but from a frequently expressed "reluctance" on the part of the Court to apply such laws in a literal manner. The dissent in Hutto v. Finney, 437 U.S. 678 (1978), candidly acknowledged that a similar rule it proposed was intended to "structur[e] the legislative process . . . to protect the states' interests." 437 U.S. at 706 n. 4. Amici submit that it is Congress, not the federal judiciary, that should undertake to structure the legislative process and to decide what interests that structure ought to protect.

SUMMARY OF ARGUMENT

Under the rule of construction applied in Parden v. Terminal Railway, 377 U.S. 184 (1964), section 504 would have been interpreted to subject to suit in federal courts state recipients of federal financial assistance. Petitioner urges that Parden is no longer new law, and that a different rule of construction was established by later decisions, most notably Quern v. Jordan, 440 U.S. 332 (1979). But Parden, regardless of whether it has now been disapproved, was the reigning constitutional theory of the day when section 504 was drafted. The standard of construction established by Quern should not be applied retroactively to statutes adopted years earlier. Members of Congress, like other public officials, "cannot be expected to predict

the future course of constitutional law." Procunier v. Navarette, 434 U.S. 555, 562 (1978).

Petitioner suggests that the intent of Congress in 1972-73 is irrelevant, since Congress in drafting section 504 failed to utilize the "foundational language" which they believe is required by Quern. Petitioner construes Quern as directing Congress to utilize certain special statutory language, and to expressly consider the consequences of subjecting states to suit in federal court, if Congress wishes to authorize such suits. This approach is supported to some degree by a dissent in Hutto v. Finney, 437 U.S. 678 (1978), which suggested that by adopting such a rule the Court could "structur[e] the legislative process" and thus "protect the states'

interests." 437 U.S. at 706 n. 4. Amici urge that under Article I it is Congress, not the judiciary, which is entrusted with the responsibility of structuring the legislative process. The interests of the states are adequately protected by the political process, and require no such judicial intervention in the internal workings of Congress. Garcia v. San Antonio Metropolitan Transit Authority, No. 82-1913. Statutes authorizing suits against any recipient of federal funds should be literally construed to authorize suits against state recipients.

ARGUMENT

I. QUERN V. JORDAN, 440 U.S. 332 (1979), SHOULD NOT BE APPLIED RETROACTIVELY TO STATUTES ADOPTED PRIOR TO MARCH 5, 1979.

This case requires the Court to

decide whether a major change in the rules of statutory construction should be applied to legislation enacted before that change occurred. The court of appeals below, in holding that section 504 abrogated the sovereign immunity of the states, relied heavily on Parden v. Terminal Railway, 377 U.S. 184 (1964) and Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959). (Pet. App. A-4). Petitioner and the United States urge, not without reason, that Parden and Petty are no longer good law. Petitioner asserts that "their holdings, for the most part, have been eviscerated" by later decisions. (P. Br. 35 n. 11). Petitioner also suggests, in light of Quern, that Hutto v. Finney, 437 U.S. 678 (1978) was wrongly decided. (P. Br. 46-47 n. 16). The United States similarly

argues that "[i]t is certainly difficult to conclude" that the circumstances of Parden present "the type of clear and unequivocal abrogation of Eleventh Amendment immunity required by" subsequent decisions. (U.S. Br. 12 n. 6).

It does indeed appear that over the last twenty years there has been a substantial alteration in the standard applied by this Court in ascertaining whether a statute abrogates a state's Eleventh Amendment immunity. The standard of construction now advanced by petitioner, and arguably supported by recent caselaw, however, was expressly rejected by this Court in Parden v. Terminal Railway, 377 U.S. 184 (1964). In Parden four members of the Court proposed that a statute be construed to abrogate a state's immunity "[o]nly when Congress has clearly

considered the problem and expressly declared that any State which undertakes given regulable conduct" will be subject to suit. 377 U.S. at 198-99. (Dissenting opinion).The majority in Parden, however, rejected this proposed requirement, and held that states were subject to suit under the Federal Employer's Liability Act even though there was no legislative history suggesting that Congress had specifically considered that issue, and no special reference to states in the statutory provision authorizing private damage actions. 377 U.S. at 188-90. The Court held that a general statutory cause of action was to be construed as applicable to state defendants "in the absence of express provision to the contrary." 377 U.S. at 190.

For fifteen years thereafter, despite repeated opportunities to do so, the Court declined to embrace the requirement of express consideration and language proposed by the dissent in Parden. In Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973), the Court held that the Fair Labor Standards Act had not abrogated the sovereign immunity of the states. But the majority in Employees neither adopted nor referred to the rigid standard rejected in Parden, and based its conclusion instead on a number of factors peculiar to the language and legislative history of the FLSA.[1] Significantly,

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[1] The majority emphasized, for example, that section 16(b), which authorized private suits, had been enacted when state agencies were not subject to the FLSA, and had not been changed after the states were made subject to that law. 411 U.S. at 285.

Justice Stewart, who had joined the dissent in Parden, concluded that the FLSA had "lifted the State's immunity from private suit", 411 U.S. at 289 (Marshall and Stewart, J., dissenting), even though the FLSA clearly did not meet the standard proposed by the Parden dissent. In Edelman v. Jordan, 415 U.S. 651 (1974), the issue of abrogation was the subject of only cursory discussion. A claim that the Social Security Act rendered states subject to suit was summarily rejected with a notation that that Act "by its terms did not authorize suit against anyone." 415 U.S. at 651. The majority emphasized that that result was mandated by "this Court's holding in Parden and Petty . . . " 415 U.S. at 672.

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court held that Title VII of the 1964 Civil Rights Act, as amended in 1972, did authorize private plaintiffs "to sue the State as employer", 427 U.S. at 452, but the Court gave no indication of what standard it had applied in arriving at that conclusion. In Hutto v. Finney, 437 U.S. 678 (1978) four members of the Court urged that, regardless of the legislative history of a statute, no law should be deemed to abrogate state sovereign immunity unless it made "express provision for monetary recovery against the states." 437 U.S. at 706. (Powell, J., dissenting). The majority, however, declined to apply that standard to the

Civil Rights Attorneys' Fees Act at issue in Hutto, holding:

> The Act itself . . . applies to "any" action brought to enforce certain civil rights laws. It contains no hint of an exception for States. 437 U.S. at 694.

In concluding that the Civil Rights Attorneys' Fees Act did apply to the states, the Court did not purport to apply a standard of construction different from that which would have been applicable to any other class of defendants.

If the Court has adopted such a special rule of construction, that did not clearly occur until Quern v. Jordan, 440 U.S. 332 (1979). Petitioner suggests that Quern holds that a statute will not be deemed to render a state subject to suit unless it both contains a special reference to states as being among the entities

subject to suit, and is based on a legislative history in which Congress carefully considered that issue. (P. Br. 33, 38) On petitioner's view a statute which merely authorizes suit against "all" recipients of federal funds would be so deficient that the legislative history of the law would be irrelevant. (P. Br. 71-72) If Quern establishes such a standard, it has clearly departed from the rule applied by the majority in Parden. In 1964 a statute authorizing suit against all persons who violated a particular law would have been construed as authorizing a suit against a state; today such a statute, at least in the absence of some special legislative history, would apparently be given the opposite construction.

We urge that such a fundamental change in the rules of statutory construction should not be applied retroactively. Congress is ordinarily and reasonably assumed to legislate with a knowledge of the law. But the legal framework within which Congress enacts a statute to achieve a particular result is the law in existence at the time of that enactment. Members of Congress, like other officials,"cannot be expected to predict the future course of constitutional law." Procunier v. Navarette, 434 U.S. 555, 562 (1978). This Court has repeatedly recognized the public officials could not govern effectively if they acted at their peril despite complying with clearly established constitutional requirements. Scheuer v. Rhodes, 416 U.S. 232 (1974). Congress would be equally obstructed in

carrying out its constitutional responsibilities if it were required to forsee changes in the rules of construction, or if such changes were applied retroactively to alter the meaning of previously enacted statutes.

A majority of this Court may now reject the standard and result in Parden v. Terminal Railway. But when section 504 was enacted, Parden was "the reigning constitutional theory of [the] day." Quern v. Jordan, 440 U.S. at 342 n. 14. Neither Petty nor Parden had required that the language or legislative history of a federal statute refer to abrogating the immunity of a state in order for that law to achieve that result. Under Parden a general statute was construed to abrogate such immunity "in the absence of express provision to the contrary." 377 U.S. at

190. Section 504 contained no such exception, and Congress was entitled to assume that it would be construed in the same manner as had the FELA.

To apply Quern retroactively to section 504 would render that statute literally meaningless in many circumstances which Congress clearly intended would be covered by the law. In Employees and Edelman the state programs at issue

federally assisted activities covered by section 504 are not permanent entitlement programs like Social Security, but short term grants for projects to be completed in a few years or less. Litigation to enforce section 504 often takes considerably longer to resolve; the five section 504 cases heard by this Court had been pending an average of 5 years[2], and only one had yet been resolved on the merits by the lower courts.[3] Thus as a practical matter a final decision granting "prospective" injunctive relief will often come only after the program at issue has been

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[2] Consolidated Rail Corp. v. Darrone 79 L.Ed.2d 568 (1984)(6 years); Alexander v. Choate, ___ U.S. ___ (1985) (5 years); Scanlon v. Atascadero State Hospital, No. 84-351 (7 years); Southeastern Community College v. Davis, 442 U.S. 397 (1979) (4 years); Camenisch v. University of Texas, 451 U.S. 390 (1981) (3 years).

[3] Southeastern Community College.

terminated; in such a case prospective relief would quite literally be meaningless. A state agency operating such a short term project, once assured that there could be no retrospective redress for a violation of section 504, would simply have no incentive to obey the law.

Even where a state is operating a permanent program, the interests of certain types of beneficiaries are so inherently transitory that for them prospective relief would also be meaningless. A student in need of special assistance to benefit from a federally assisted college education cannot defer his or her education until a section 504 claim has been resolved; by the time such a claim has been finally decided, and a court is ready to provide prospective relief, the student will often have

graduated. Job applicants, such as respondent Scanlon, only rarely have an interest in prospective judicial relief awarded years after the original act of discrimination. Both economic necessity, and the obligation to mitigate damages, compel a victim of section 504 hiring discrimination to seek other work. Ford Motor Co. v. EEOC, 458 U.S. 219, 232-233 (1982). In the instant case the position for which respondent Scanlon applied in 1978 was that of a "graduate student assistant" (J.A. 9). We are advised by counsel for respondent that Mr. Scanlon has long since completed his education and is no longer a graduate student. Today, some seven years after his claim arose, respondent, like most rejected job applicants, would obtain no apparent benefit from prospective relief

directing petitioner to refrain from discrimination in the hiring of graduate student assistants. "For people in [Scanlon's] shoes, it is damages or nothing." Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). Congress did not intend in enacting section 504 to forbid discrimination by state agencies on the basis of handicap and yet simultaneously withhold what would frequently, as here, be the only meaningful remedy.

To apply Quern retroactively would also wreak havoc throughout the United States Code. The great majority of all statutes now on the books were enacted prior to Quern. Congress could not have known when it adopted the hundreds of laws that would be affected that this Court would hold in 1979 that a particular form

of language or legislative history would be required to abrogate a state's immunity. Retroactive application of Quern would require Congress to reappraise and reenact large portions of the federal code merely to restore the original meaning of laws enacted years or decades prior to Quern.

The particular result in Quern did not necessarily turn on an application, retroactive or otherwise, of the standards there suggested. Section 1983, the statute at issue in Quern, has long been construed to incorporate the common law immunities which prevailed in the states in 1871. Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators). Since sovereign immunity was the prevalent if not universal rule among the states in that era, Quern may be justified as no

more than an application of the same principles that had governed in Imbler and Tenney. Quern itself emphasized that statutes were to be construed in light of the law prevailing when they were enacted, not on the basis of legal developments that lay in the future. 440 U.S. at 342 n. 14.

Petitioner and the United States suggest that the standard suggested by Quern may to some degree have been presaged by the holdings in Employees,[4] Edelman, Fitzpatrick and Hutto. Any hint that might have been gleaned from those cases as to what lay ahead fell far short "clearly established" rule this Court has

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[4] Petitioner appears to urge that the rule in Quern was preordained by Edelman v. Jordan (P. Br. 37-38). Edelman, like Quern, was decided after the enactment of section 504.

previously required. Procunier v. Navarette, 434 U.S. 555, 563-65 (1978). The seeds of almost any decision are to be found in earlier precedent, but that by itself surely is insufficient to put public officials on notice as the manner and direction in which the law will grow. In the years between Employees and Quern many lower courts did not understand there to be a requirement of express language or legislative history, and statutes involving neither continued to be construed as abrogating state sovereign immunity.[5]

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[5] See, e.g., Green v. State of Utah, 539 F.2d 1266, 1273 (10th Cir. 1976) (sale of stock under Securities Act of 1973); Jennings v. Illinois Office of Education, 589 F.2d 935, 936 (7th Cir. 1979); Mills Music, Inc. v. State of Arizona, 591 F.2d 1278, 1283-84 (9th Cir. 1979); Witter v. Pennsylvania National Guard, 462 F. Supp. 279, 306 (E.D.Pa. 1978); Camacho v. Public Service Comm'n, 450 F. Supp. 231, 234 (D. Puerto Rico 1978)

Commentators expressed considerable uncertainty about the applicable rule of construction.[6] Quern itself described Hutto as involving a disagreement about the rule laid down in Edelman. 440 U.S. at 339 n. 8. Under these circumstances Congress "could not reasonably have been expected to be aware of a constitutional [rule] that had not yet been declared." Procunier v. Navarette, 434 U.S. at 565.

Even if this Court were to hold that the standard suggested by Quern was forseeably preordained by the decision in Employees, the application of that

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[6] Field, "The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon States", 126 U. Pa. L. Rev. 1203, 1247 (1978) (standard an "open" question); Liberman, "State Sovereign Immunity in Suits to Enforce Federal Rights", 1977 Wash. U.L.Q. 195, 251 (Employees an aberration unlikely to be followed in the future).

standard here would still be inappropriate. Employees was decided on April 18, 1973. Section 504 was drafted and reported out by the Senate Committee on Labor and Public Welfare on September 20, 1972. S. Rep. No. 93-318. The Vocational Rehabilitation Act containing section 504 was first passed by the Senate on September 26, 1972, and agreed to by the House on October 14, 1972. (118 Cong. Rec. 32279, 36409). Following a veto unrelated to section 504, the Act was again passed by the Senate and House on February 15 and 28, 1973, only to be vetoed a second time. (119 Cong. Rec. 5901, 7139); The differences between the President and Congress were resolved during 1973, and the legislation was finally signed into law on September 26, 1973. At the time

when section 504 was written and twice approved by Congress it could only have been understood as subjecting the states to suit, since Parden was then this Court's most recent Eleventh Amendment decision. To conclude that section 504 as finally approved had a different meaning, one must assume that the entire Congress changed its mind as to whether states should be subject to suit, read and understood Employees to have altered the applicable rules of construction, and then concluded that Employees had brought about precisely the desired change, all without a word being spoken on the subject in either the House or Senate. This Court has not in the past resorted to such far fetched hypotheses to interpret statutes, and it should not do so here.

II. ARTICLE I DOES NOT AUTHORIZE THIS COURT TO DIRECT CONGRESS, AS A PRECONDITION OF LEGISLATION SUBJECTING A STATE TO SUIT IN FEDERAL COURT, TO "FOCUS DIRECTLY ON THE QUESTION OF STATE LIABILITY."

Eleventh Amendment jurisprudence over the last twenty years has been driven by two very different views regarding how this Court should decide whether a statute subjects a state to suit in federal court. One approach has been essentially interpretive -- seeking merely to determine whether Congress intended that states could be sued. On that view the task before the Court is not different in kind than determining whether Congress intended to authorize suits against cities or judges or corporations. The second approach has been prescriptive -- purporting to delineate how Congress should be required to act if it wishes to authorize

suits against states. The implementation of this prescriptive approach requires that the Court first establish the rules which it wants Congress to obey and then decide whether Congress has done as required.

It remains unclear whether a majority of the Court has embraced the notion that the judiciary can insist that Congress act in a certain way if it wishes to abrogate the immunity of the states. In Parden the dissent urged that "[a] decent respect for" the Eleventh Amendment required Congress to express itself "with unmistakable clarity" when Congress desired to override that immunity. 377 U.S. at 199. The majority opinion in Employees although primarily interpretive in tone, admonished that Congress would

not be "acting responsibly" if it limited that immunity without express consideration of the financial consequences to the states. 411 U.S. at 284-85. The prescriptive view of the Court's role was articulated most clearly by the dissent in Hutto v. Finney, which proposed that the Court require Congress to use "statutory language sufficiently clear to alert every voting Member of Congress of the constitutional implications of particular legislation", 437 U.S. at 705, and explained that this rule would help "to protect the states' interests." 437 U.S. at 706 n. 4. Both Employees, 411 U.S. at 286, and Pennhurst State School & Hospital v. Halderman, 79 L.Ed.2d 67, 78 (1984), candidly expressed a "reluctance" to construe federal legislation to authorize

suits against states, a reluctance based, not on any view that a congressional intent to do so was unlikely, but apparently on the view that the authorization of such litigation was simply undesirable.

The actual decision in Quern v. Jordan is avowedly interpretive, emphasizing the probable meaning of the 1871 Civil Rights Act and its legislative history in light of then prevailing constitutional and common law principles. 440 U.S. at 341-43. Quern might also be read, as petitioner proposes, to prescribe rules for congressional action which are similar in tone to, although somewhat different in substance from, the requirements proposed by the dissents in Parden and Hutto. Quern emphasized that section 1983 "does not explicitly and by clear

language indicate on its face an intent to sweep away the immunity of the States" and "does not have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the states." 440 U.S. 345. As applied to section 1983 any such standard simply could not be a rational method of divining the intent of the forty-second Congress, since section 1983 was enacted in 1871, 19 years before the Court in Hans v. Louisiana, 134 U.S. 1 (1890), first indicated that the states enjoyed any Eleventh Amendment immunity from suits by their own citizens.

Both petitioner and the United States construe Quern as prescribing a standard which Congress must meet if it wishes to

render states subject to suit in federal court. Neither argue that when Congress enacted section 504 in 1972-73 it decided that states, unlike all other recipients of federal aid, should not be subject to suit in federal court. They urge, rather, that Congress, whatever its intent, failed to take the steps required to meet this Court's present standards. Petitioner describes the critical issue in this case to be delineating the "necessary conditions for abrogation . . . of immunity," (P. Br. 30), and characterizes this Court's decisions as prescribing what Congress "must do" "[i]f . . . Congress intends to impose a forfeiture of immunity . . ." (P. Br. 83). The United States describes the issue as "how clear Congress must be when it abrogates states' Eleventh

Amendment immunity," (U.S. Br. 9), and declares that Congress' actual intent is simply irrelevant if the statute which it enacted failed to meet the "most exigent standard of explicit[ness]" (U.S. Br. 3).

Although we disagree with petitioner's and the United States' view regarding what the standard ought to be, we concur in their view that the type of standard which they propose can only be understood as a special judicially established requirement which Congress must meet if it wishes to subject the states to suit in federal court. Over the last two decades of Eleventh Amendment litigation, litigation which has spawned a plethora of concurring and dissenting opinions, no member of this Court has ever suggested that Congress itself attaches

overriding importance to protecting the states from suit in federal court, or regards such suits as an extreme remedial measure to be resorted to under only the most exigent of circumstances. Whatever views of state immunity may have preoccupied Patrick Henry, George Mason, and other Anti-Federalists in 1787-88, the debates of Congress in our own century reflect no similar concerns. The states rights issues which have divided Congress in recent generations have involved disputes about what action Congress could properly require the states to take, not whether such requirements, once established, should be enforced in federal court. Congress has been quite sensitive to the financial burdens that new federal legislation might impose on the states,

but that sensitivity has focussed on the costs that would be borne by states which in good faith obeyed those statutes; no similar Congressional solicitude has existed for states which, having violated those laws, might be ordered to redress the resulting injuries.

The peculiar remedial scheme that petitioner proposes, in which states may be subject to injunctions but not damage awards, while all other institutions violating the law are subject to both, cannot plausibly described as a remedial approach so long adhered to by Congress as to be presumed to be the desired scheme in all legislation. On the contrary, petitioner cannot point to a single statute which expressly makes any such distinctions as to the relief available against various types of defendants, and

so far as we are aware none exists. When Congress wishes to limit judicial relief to injunctions, it has done so expressly, and has applied that limitation to suits against all defendants.[7] Typically such limitations have been utilized where the underlying violation, such as exclusion from a restaurant on the basis of race, was unlikely to cause substantial monetary damages. Similarly, when Congress has had reservations about subjecting the states to a particular statutory regulation, it has chosen, not to require the state to obey and then exempt it from enforcement, but to completely exempt the state from

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[7] See, e.g., Title II of the 1964 Civil Rights Act, 42 U.S.C. § 2000a-3(a); 16 U.S.C. § 1540(g)(1); 49 U.S.C. §§ 1686, 2014.

coverage by the law at issue.[8] Significantly such exemptions have traditionally been extended to local governments as well as the states, a practice clearly unrelated to any Eleventh Amendment principle.

Petitioner asserts that "Congress does know how to provide at least the foundational language for an attempt at abrogation of States' immunity." (P. Br. 59-60). This is an artful suggestion that Congress understands that this Court requires it to legislate in a special way if it wishes to override state immunity. Petitioner's use of the term "attempt" aptly captures the nature of the proposed approach, reflecting the very real possibility that a statute intended to

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[8] This was true of both Title VII of the 1964 and the Fair Labor Standards Act in the form in which they were first enacted.

achieve such abrogation might be inoperative because the framers failed to utilize certain judicially mandated "foundational language."[9] Thus petitioner is not the least embarrassed that the the decision in Employees, the well spring of modern Eleventh Amendment jurisprudence, was immediately overruled by Congress. (P. Br. 58-59). To petitioner that result indicates not that the Court erred in "interpreting" the Fair Labor Standards Act but that the Congress which adopted the Act had erred in not using the requisite "foundational language".

This argument illustrates the serious constitutional problems inherent in the position proposed by petitioner and by the

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[9] See also P. Br. 61 (requirements for "a successful expression of Congressional abrogation") (Emphasis added).

dissenters in Parden and Hutto. Under Article I legislation will become effective if three conditions are met: a statute whose literal language encompasses the result intended by Congress must be approved by the House, approved by the Senate and, ordinarily, approved by the President. That is all that is necessary for a statute authorizing federal jurisdiction over suits against almost any defendant, and a statute authorizing suit against "any person" who took certain action, since literally all inclusive, would suffice to encompass all individuals and entities. But on petitioner's view Congress must take either or perhaps both of two additional steps if it wishes to enact a law extending federal jurisdiction to suits against states. First, states must be specially listed as a defendant

subject to suit; as a matter of constitutional law "any person" is to mean "any person other than a state.' Second, Congress must expressly discuss the consequences of rendering the states subject to suit and do so in a recorded debate or some other fashion demonstrable in court. Absent either of these requirements, apparently, a statute intended to render the states subject to suit would simply be of no effect.

We do not believe that this Court is authorized to mandate any such special legislative procedures. Article I provides the Congress, not this Court, with the federal legislative power, and leaves the framing of statutes and the procedure for enactment to Congressional discretion. Article I does not require

Congress to utilize "foundational language" or any particular technical formula in drafting legislation, or to list specially certain types of potential defendants under proposed legislation. Similarly, Article I does not mandate that Congress record its debates or issue written committee reports, and the courts are not at liberty to partially nullify legislation because Congress has failed to debate a topic that may be of particular interest to the judiciary. Such rules might in some instances prevent the enactment of unwise legislation, as could a practice of requiring that three-quarters of the House and Senate approve any bill, but these simply are not the procedures contained in Article I.

The dissenting opinion in Hutto offers the following justification for requiring the special legislative language rule there proposed:

> By making a law unenforceable against the states unless a contrary intent were apparent, in the language of the statute, the clear statement rule . . . ensure[s] that attempts to limit state power [are] unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interests. 437 U.S. at 706 n. 4. (Emphasis in original).

On this view requiring that legislation contain a special reference to lawsuits against states is deemed desirable because it maximizes the likelihood that the legislation will be defeated. The structuring of the legislative process, however, is an internal matter to be

regulated by the House and Senate, not by the courts. Whether to require, permit, or curtail congressional discussion of a particular topic is a decision which Article I entrusts to the legislative branch. The judiciary is no more authorized to override those decisions than it is to alter the number of votes required to end a filibuster, or to overturn the procedures established by the House Rules Committee for the consideration of a bill.

Congress was fully responsive to the interests of the states in the days of Parden v. Terminal Railway, and remains so today. The Constitution assures that that responsiveness will exist, however, not by authorizing judicial control over the procedures of the national legislature, but by providing that the members of the

House and Senate are to be elected from the states that will be affected by any federal legislation. Garcia v. San Antonio Metropolitan Transit Authority, No. 82-1913, slip opinion p. 28. The views of state officials carry considerable weight when Congress undertakes the often difficult task of striking the proper balance between state and federal interests and policies. Where, however, Congress has resolved, as in section 504, to forbid state recipients of federal assistance to discriminate against handicapped individuals, it is exceedingly inappropriate, and not in accordance with the Constitution, for this Court to adopt a rule of construction whose avowed purpose is to provide "the greatest

opportunity" to those who might oppose legislation authorizing full judicial relief for a state violation of that law.

We believe that this Court should limit itself to interpreting the law, its proper constitutional role, and should eschew maxims of construction framed for the purpose of increasing the likelihood that statutes will be construed to treat state agencies differently than other potential defendants. When Congress approves a bill whose broad language makes no distinctions among those who may be subject to suit in federal court, it has done all that Article I requires in order to enact legislation rendering the states liable to such suits. The judiciary has no more authority to establish additional requirements than Congress or the President have to dispense with requirements

that they may find inconvenient. Immigration and Naturalization Service v. Chadha, 77 L.Ed.2d 317 (1983).

CONCLUSION

For the above reasons the decision of the court of appeals should be affirmed.

Respectfully submitted,

BONNIE MILSTEIN
Center for Law and
Social Policy
1751 N Street, N.W.
Washington, D.C. 20036

(202) 872-0670

Counsel for Amici